UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS, Plaintiff/Counter-Defendant, v. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN and the NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN, Defendants/Counter-Plaintiffs.	)	Case No. 8:18-cv-02098-CEH-JSS

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER TO DEFENDANTS' COUNTERCLAIMS SEEKING RECOVERY OF DISABILITY BENEFIT OVERPAYMENTS OR THE FULL VALUE THEREOF

INTRODUCTION

On June 24, 2019, Defendants Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Retirement Plan") and NFL Player Disability & Neurocognitive Benefit Plan ("Disability Plan," and together the "Plans") filed counterclaims designed to recover nearly $1 million in disability benefits (exclusive of interest) overpaid to Keys due to his fraud against the Plans (ECF 39). On July 8, Keys answered the Plans' counterclaims (ECF 40). On August 27—a mere 10 days before discovery was set to close and approximately one month before the dispositive motions deadline—Keys moved for leave to amend his answer to add an affirmative defense to the Plans' counterclaims (ECF 46, "Motion"). The would-be defense asserts that Plan language precludes the Plans from bringing counterclaims to recover overpayments.

Keys' proposed amendment is untimely and prejudicial to the orderly and efficient disposition of this case, and this alone warrants denial of Keys' Motion. Keys offers no excuse or explanation for why he failed to raise the defense earlier. The defense does not turn on any recently-discovered facts or information. To the contrary, it arises exclusively from the Plans' governing documents, *i.e.*, documents Keys has possessed for years prior to making his Motion.

In addition, the proposed amendment is futile. Keys invented the defense to support his efforts to block discovery related to the Plans' counterclaims. For the reasons explained in the Plans' opposition to Keys' motion for protective order (ECF 47), Keys' theory that the terms of the Plans themselves preclude the Plans' counterclaims in this litigation is meritless. Keys' interpretation of Plan language contradicts the express terms of the Plans, and effectively would prevent the Plans' from fully recovering overpayments to the detriment of the Plans as a whole and their other, innocent participants.

For these reasons, as explained more fully below, the Court should deny leave to amend, and in doing so remove one of Keys' obstacles to discovery, dispositive motions, and the resolution of this case.

BACKGROUND

In February 2018, the Plans' administrator determined that Keys received substantial disability overpayments over the course of nearly 20 years. *See generally* Decl. of Michael L. Junk, Ex. A ("Final Decision Letter"). First, Keys received at least $39,000 of line-of-duty ("LOD") disability benefits to which he was not entitled because he failed to report to the Plans his simultaneous receipt of workers' compensation benefits. Second, Keys received $831,111.82 (exclusive of interest) in total and permanent ("T&P") disability benefits to which he was not entitled because the Plans' administrator found, in its discretion, that Keys submitted materially false and incomplete information in connection with his application for benefits. Countercls., ECF 39, ¶ 49.

As a result, the Plan administrator retroactively reduced and then terminated the future T&P benefits Keys theoretically would be entitled to receive from the Retirement Plan to partially recover the prior overpayments. Junk Decl., Ex. A, at 1. In the Final Decision Letter, the Plan administrator explicitly reserved its right to "take additional steps to recover the overpayment to [Keys]." *Id.*

Keys brought this case to overturn the Plan's decision to turn off his disability benefits. Compl., ECF 1.

The Plans timely answered Keys' complaint and filed counterclaims. Defs.' Answer and Countercls., ECF 39. The counterclaims arise under section 502(a)(3) of ERISA and seek to recover the nearly $1 million in overpayments that Keys secured by virtue of his fraud. *See id.* at 23-24, 31-32. Among the counterclaims were claims for an equitable lien or constructive trust over assets traceable to the funds the Plans overpaid Keys. Countercls., ECF 29, ¶¶ 27, 55, 56.

Keys answered the Plans' counterclaims and asserted several affirmative defenses. Notably, the defenses did not include a defense that the Plans' governing documents preclude the Plans' counterclaims. Pl.'s Answer to Defs.' Countercls., ECF 40, at 6-9.

The Plans served discovery on Keys relating to the existence of assets traceable to the funds overpaid to Keys by the Plans. The Plans also served third-party subpoenas on two banking institutions that may have this information, as well. Keys refused to substantively respond to the Plans' discovery requests, opposed the Plans' motion to compel (ECF 45), and filed a motion for a protective order regarding the third-party discovery propounded on the banks (ECF 44).[1]

In his protective order motion and opposition to the Plans' motion to compel, Keys raised for the first time the would-be defense that the Plans' governing documents do not permit the Plans to recover overpayments to Keys both through offset of future benefits and through other methods chosen by the administrator. Realizing that Keys did not include this defense in his answer (ECF 40), Keys filed this Motion to amend his answer.

STANDARD OF REVIEW

Rule 15(a)(2) provides that after service of a responsive pleading, "a party may amend its pleading only with the opposing party's written consent or the court's leave." While "[t]he court should freely give leave when justice so requires[,]" Fed. R. Civ. P. 15(a)(2), a court should deny a motion for leave to amend a pleading if: "(1) the amendment would be prejudicial to the opposing party, (2) there has been bad faith or undue delay on the part of the moving party, or (3) the amendment would be futile." *Taylor v. Fla. State Fair Auth.*, 875 F. Supp. 812, 814 (M.D. Fla. 1995) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Ritter v. Nonprofit Info. Networking Ass'n*, No. 816CV01386CEHAAS, 2017 WL 821851, at *3 (M.D. Fla. Mar. 2, 2017) (J.

[1] The banks have responded to the Plans' discovery requests; however, the Plans will not review the banks' responses

Honeywell) ("Courts should grant leave to amend freely unless there is undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment.") (internal quotations omitted). "An amendment to an answer is futile if a newly proposed defense would necessarily fail." *Fed. Deposit Ins. Corp. v. Bayer*, No. 213CV752FTM29DNF, 2014 WL 12616963, at *1 (M.D. Fla. Apr. 1, 2014).

ARGUMENT

I. THE AMENDMENT IS UNTIMELY AND PREJUDICIAL

Keys has no excuse for why he did not raise this new would-be affirmative defense in his answer to the Plans' counterclaims. The defense is not based on any new facts or information. To the contrary, the defense springs from language found within Plans' governing documents that Keys and his attorneys had for years prior to bringing the instant Motion. It also is at odds with the reservation of rights in the Final Decision Letter to take other actions to pursue recovery of the overpayments—a letter that Keys has had since February 2018. *See* Junk Decl., Ex. A, at 1.

The prejudice to the Plans is real and unavoidable. Keys plainly invented the defense as an afterthought, and is using it as a reason to block the Plans from taking discovery on their counterclaims. So far, he has pointed to this newfound defense—even though he never joined the issue in the case—to oppose the Plans' motion to compel discovery (Pl.'s Resp. in Opp. To Defs.'/Counterpls.' Mot. to Compel, ECF 45, at 10-11) and support a separate motion for protective order (*See generally* Pl.'s Mot. for Protective Order, ECF 44) related to third-party discovery attempted by the Plans.

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unless or until this Court rules in favor of the Plans on Keys' motion for protective order.

Prejudice extends beyond merely thwarting the Plans' legitimate discovery efforts. Keys' proposed amendment threatens to upend the remaining deadlines in this case, the dispositive motions deadline being chief among them. Under the existing case management order, the parties are scheduled to file dispositive motions in less than one month, a deadline the Court extended once before. Am. Case Management and Scheduling Order, ECF 37, at 1. Keys' Motion adds to the already considerable volume of pending motions before and burden placed on the Court. It also has the potential to introduce yet another issue for dispositive briefing, which would add to the time and expense the Plans must devote to this litigation. Keys has already achieved delay in this case, to the prejudice of the Plans; granting Keys leave to amend his answer would only reward his strategy to delay and derail.

Given the eleventh-hour nature of Keys' Motion, and the resulting prejudice to the Court and the Plans alike, the Court has "justifying reason[s]" to, and should, deny Keys' Motion.[2] *Taylor*, 875 F. Supp. at 814. Any other outcome would reward Keys for his lack of diligence and obstructionism.

II. THE AMENDMENT IS FUTILE

Keys' Motion also should be denied because the proposed amendment is futile.[3] While Keys maintains that the Plans' terms prohibit the Plans from seeking equitable relief, that argument is plainly at odds with the terms and intent of the Plans. The Plans' documents specifically authorize the Plans' administrators to "[r]ecover any overpayment of benefits through reduction or offset of future benefit payments or other method chosen by the" Plan administrators. Junk Decl, Ex. B, at Keys_AR 00205, 2017 Retirement Plan Doc. § 8.2(o); Junk Decl., Ex. C, at Keys_AR 00353, 2017

[2] Bad faith provides another, independent ground for denial of the Motion. Keys' cynical defense is designed to frustrate a full recovery of overpayments he received through his fraudulent concealment of information relevant to his disability benefits. *See generally* Countercls., ECF 39.

[3] *See also* Defs.' Opp. To Pl.'s Mot. for Protective Order, ECF 47, at 8-12 (discussing that the Plans' terms authorize the Plans' administrators to bring the counterclaims).

Disability Plan Doc. § 9.2(o). The plain intent of the Plans' expansive recovery of overpayments provision is to give the Plans' administrators the broadest possible power and authority to recover overpayments of Plan assets, which the Plans' fiduciaries are duty-bound to preserve for the benefit of all Plan participants. *See* 29 U.S.C. § 1001(b); *see also Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Const. Co.*, 932 F.2d 1443, 1450 (11th Cir. 1991) ("one of the fundamental common law duties of a trustee is to preserve and maintain trust assets," which requires the trustees to "discover the location of the trust property and to take control of it") (citations omitted). The Plans' administrators must be allowed to exhaust all avenues of recovery in order to discharge their duty to preserve assets. *See id.*

Notably, Keys' argument that the Plans are precluded from pursuing recovery both through offset and other methods cannot apply to recovery by the Disability Plan because Keys is not entitled to future benefits from the Disability Plan. *See, e.g.*, Junk Decl. Ex. A, at 1 (the Board determined that Keys was entitled to Inactive B T&P benefits, if any benefits at all); Junk Dec. Ex. B, at Keys_AR 00101 (showing Inactive B benefits paid from the Retirement Plan); Junk Decl., Ex. C, at Keys_AR 00275 (showing no Inactive B benefit paid from the Disability Plan). Because the Disability Plan does not owe Keys future benefits, it is not offsetting future benefits against the overpayment; it is only pursuing "other methods" of recovery.

In any event, Keys' argument that the Plans must choose to offset future benefits to the exclusion of any other remedy, or *vice versa*, would lead to absurd results. If the Plans chose to offset Keys' future benefits, the Plans would never fully recover because Keys' future disability benefits are expected to be far less than the overpayment. If the Plans chose instead to recover through means that do not include offset, the Plans would have continued (over)paying Keys disability benefits each month even though Keys had already received nearly $1,000,000 in overpayments. The Plans should not have to make this binary Hobson's choice.

Moreover, the Plans' administrators have discretionary authority to "interpret, control, implement, and manage the Plan," including authority to define and construe the terms of the Plans, and reconcile any inconsistencies in the Plans. Junk Decl, Ex. B, at Keys_AR 00205, 2017 Retirement Plan Doc. § 8.2; Junk Decl., Ex. C, at Keys_AR 00352, 2017 Disability Plan Doc. § 9.2. If there is any question about the breadth of the Plans' overpayment provisions, the Court should defer to the Plans' administrators' view that the provision permits the Plans to recover overpayments through both a reduction of future benefits together with any other method necessary to accomplish the purpose of the provision. *See Conkright v. Frommert*, 559 U.S. 506, 512 (2010) ("If the trust documents give the trustee power to construe disputed or doubtful terms, the trustee's interpretation will not be disturbed if reasonable.") (citations omitted); *see also Blue Heron Beach Resort Developer, LLC v. Branch Banking & Tr. Co.*, No. 6:13-CV-372- ORL-36, 2014 WL 2625255, at *7 (M.D. Fla. June 12, 2014) (while "the word 'or' is a disjunctive participle. . . there are of course familiar instances in which the conjunctive 'or' is held equivalent to the copulative conjunction 'and,' and such meaning is often given the meaning 'or' in order to effectuate the intention of the parties as to a written instrument. . . ."); *Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1104 (11th Cir. 2014) (In interpreting a contract, a court "read[s] the words of a contract in the context of the entire contract and construe[es] the contract to effectuate the parties' intent.").

Because Keys' purported defense is hostile to both the purpose of the document (to allow the Plans to recover overpayments) and ERISA (to protect the interests of participants and beneficiaries), allowing Keys to amend his answer to add this defense would be futile.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's motion to amend his answer.

Dated: September 10, 2019

By:

/s/ Michael L. Junk

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